United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

74-2675

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P/S

To be argued by
LAWRENCE STERN

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

FREDDIE HILTON,

Defendant-Appellant

Docket No. 74-2675

ON APPEAL FROM A
JUDGMENT OF THE UNITED
STATES DISTRICT COURT
FOR THE EASTERN
DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLANT

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UNITED STATES OF AMERICA, Appellee, -against- FREDDIE HILTON, Defendant-Appellant.	Docket No. 74-2675

ISSUES PRESENTED

1. Whether the Government's misuse of evidence and argument to the jury to prove Appellant's criminal character, while vouching for the integrity of its confessed attempted murderer chief witness, and the prejudicial references by its witnesses to other crimes and Appellant's dangerous character, deprived Appellant of a fair trial.

2. Whether the Court's preclusion of evidence of Appellant's self-defense justification for possession of the gun and the government witness' motive to fabricate a case against Appellant, and the Government's failure to preserve evidence damaging to the credibility of its witness, deprived Appellant of the rights to present a defense and cross-examine witnesses.

3. Whether the Court erred in failng to charge the jury that an element of the charge of bank robbery conspiracy was the federally insured character of the bank that was the object of the conspiracy.

4. Whether because the jury deliberations leading to the guilty verdict of conspiracy occurred largely while one juror was "very emotionally disturbed" to the "point of physical distress" and "permanent damage" to his health, and an acquittal of the acts necessary to the proof of the conspiracy charge occurred after the condition was supposedly in remission, the verdict on the conspiracy charge was not rationally achieved.

5. Whether the Court abused its discretion in denying Appellant Youth Corrections Act treatment without a "no benefit" finding.

STATEMENT PURSUANT TO RULE 28(a)(3)

A. Preliminary Statement

This is an appeal from a judgment of the United States District Court for the Eastern District of New York [Mishler, J.], rendered on December 23, 1974, convicting appellant, after trial by jury, of conspiracy [18 U.S.C. § 371] and sentencing him to five years imprisonment.

Timely notice of appeal was filed, and this Court assigned Robert Bloom as counsel on appeal.

B. Statement of Facts

In an indictment filed January 24, 1974, Freddie Hilton, appellant herein, was charged alone in four counts of bank robbery [18 U.S.C. §§ 2113(d), 2], bank robbery with abduction [18 U.S.C. §§ 2113(e),2], and conspiracy [18 U.S.C. § 371]. The third count, bank robbery with abduction, was dismissed prior to trial, and the jury ultimately acquitted appellant of the other substantive bank robbery offenses, counts one and two.

The Jury Voir Dire

During the jury selection process, counsel objected that the prosecutor was systematically challenging young people. The prosecutor conceded at one point that four out of the preceding six of his challenges were against young people, but asserted that he had the same right to do this as the defense had a right to exclude

middle-aged white men (101-102). Counsel replied, "the responsibility of the Government is a different responsibility from that of the defense counsel." The Court agreed but didn't think "it goes so far where the Government has to pick your jury." (102)

Counsel objected to the final 12 jurors as not being the peers of the defendant on trial, not of his age or race. The Court replied for the record,

> I don't suppose it's possible to get an absolute reflection of what our district looks like from here to Montauk, but I will say that the Jury certainly is typical. Two and possibly three black women, one black man. As to the age grouping, with respect to Juror Number Three and Juror Number Eleven, they are at least in their thirties... The rest look to be from thirty to thirty-five. (115-116)

Counsel's motions to strike the jury and the panel were denied (116). Counsel noted for the record,

> in the panel of 66 people... I counted either 6 or 7 black people on that panel...
>
> THE COURT: And 3 or 4 of them find places on the Jury. That is pretty good.
>
> MR. BLOOM: For you it's good, your Honor, because you're white. For Mr. Hilton it's not so good because he's black.
>
> THE COURT: No. I say it's good because I am fair. I reject that claim because I'm white. I feel I am color blind.
>
> MR. BLOOM: I wish everyone were, your Honor. However this country has

been built indeed in good measure on racial distentions and racial prejudice.

THE COURT: I wish some whites were color-blind, too, as to whites.

MR. BLOOM: Oh, I find that some whites as well as some blacks are fair. (175-176)

The Trial

Valerie Grivas, the assistant manager of the Jackson Heights Savings and Loan Association at 89-01 Northern Boulevard, Queens, testified that at 11:00 A.M. on April 10, 1973, two black people came into the bank, ordered "everyone down," frisked the guard, vaulted the counters, put the money in a brown paper bag and a purple canvas bag, and in four minutes were out of the bank (179-182*). Two distinct gunshots were fired before the robbers vaulted the counters (185, 492). One of the robbers, whose face she could see clearly, had on a knit hat and sunglasses; the other had nothing covering his face (488).

The tellers' proof sheets for that day showed a shortage of $5,887.00 (192-194).

Over objection that it was irrelevant to the issues on this trial, a 1966 insurance certificate of the Federal Savings and Loan Insurance Corporation was introduced into evidence (188-190). A cancelled check

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* Numerical references are to pages in the trial transcript.

to that corporation, dated 1974, indicating premium payment for February 1973, through February, 1974, was also received, over the same objection (191).

Dorothy Guttilla, the head teller at the bank, testified that she saw two negro males during the robbery, and she also heard two shots fired (499-501).

Avon White, named with Phyllis Pollard and Twyman Myers, co-conspirators, but not co-defendants in the bank robbery conspiracy, testifed that he lived with Myers, Pollard, appellant and Melvin Kearney in an apartment on Marion Avenue in the Bronx in March and April, 1973. In late March, there was a discussion in the apartment among those five about a bank robbery. White could only recall the discussion in general terms; objection to that was overruled (211-212). Myers suggested the Jackson Heights bank, and he and Pollard agreed to go there. Later, they came to the apartment with a purported diagram of the bank. It was decided that Pollard and White would vault the counters, that Myers would control the guard, and that appellant would drive the getaway car (212-215).

On April 9, 1973, White and appellant went to the Queens College campus. White carried two guns, and appellant carried a, "9 millimeter and a .32" (18, 17-18). The prosecutor, lead White into the testimony:

Q: Was there anything unusual about the nine millimeter that he had?

A: Anything unusual?

Q: Was there a serial number on it?

MR. BLOOM: Objection, your Honor.

THE COURT: Overruled. I will allow it.

THE WITNESS: No. His - he scraped it off.

(219)

A gun was produced and marked as Government Exhibit 13, and, over objection, White was permitted to testify that it was similar to the one carried by appellant on April 9 (219). Then, over objection that the prosecutor was "aiming" the gun at White, showing it to him in a prejudicial manner and giving him the opportunity to see the brand name on it, White was permitted to respond that the gun appellant carried on April 9, was a Browning (220). The gun was also the same kind carried by White himself during the robbery (259).

The two men commandeered a four door car and its driver in the Campus parking lot and drove off with appellant at the wheel. White testified that he told the car owner that he and appellant were narcotics addicts and needed the money (222-223). They let the car owner out of the car near an exit to the Long Island Expressway, and then they discussed taking a dry run from the bank. The prosecutor lead White into the following testimony:

Q: So after dropping this man off, where did you go in his car?

A: We went on to the - the Grand Central Parkway.

Q: To where?

A: Back to the Bronx.

A: Well, no. After dropping him off, did you go to the vicinity of the bank?

MR. BLOOM: Oh, objection.

THE COURT: Overruled. I will allow it.

A: No.

MR. BLOOM: Leading, your Honor.

THE COURT: Overruled.

(225-226)

White testified they drove from the L.I.E. to the Grand Central Parkway, noting the travel time of 5 minutes between the approach to the Triboro Bridge and the Bridge toll booth and into the Bronx. They figured 8 minutes from the bank to the toll booth. They returned to Marion Avenue (227-230).

That evening, White, Myers, Pollard, Kearney and appellant moved over to an apartment on Jessup Avenue, and from there at 9:30 A.M. the next morning, White, Myers, Pollard and appellant, at the wheel, drove in the stolen car to the bank. Appellant dropped them off a block from the bank and drove around the corner. Inside the bank, White and Pollard vaulted the counters and put the money in pillowcases; there were no brown bags (233-235, 258-59).

Myers held the guard at the door. They were all supposed to pull their knit hats down over their faces; White was certain he had pulled his down over his face (257). He did not fire his gun, and Pollard's gun went off accidentally only once while she was vaulting the counter (256, 260, 370). When they finished, they had to wait for appellant who had not gotten back to the bank because he was stuck behind a garbage truck. Finally, appellant reached the bank; they jumped into the car and drove away. At the last exit off the Grand Central Parkway, the car had a flat tire. They drove it into a diner parking lot, took the subway to 126th Street and Lexington Avenue and, from there, a cab back to the Bronx (236-237). Except for $200.00 per person, the money was put in a "kitty for food and rent and guns and stuff." (386). Since the prosecutor was supposed to have instructed White not to mention other crimes or incriminating circumstances unconnected to the charges on trial and because of the obvious prejudice, a motion for mistrial was made on the basis of these remarks. The motion was denied. (412).

According to his own testimony on direct and cross, at the time of trial, White, 23 years old, had amassed an extensive criminal record of robbery and attempted murder. At the age of 14, he spent 14 months in institutions as a convicted juvenile. He was later jailed for 6 months

in North Carolina for carrying a concealed weapon. There he used the alias, Paul Jamal Peterson, and he continues to use aliases "anytime he chooses" (207,248). Three more years were spent in New York State institutions as a Youth Offender for an assault on a police officer. At some point his parole was revoked for possession of marijuana (205-207, 247-248).

At the time of trial he was awaiting sentence on two guilty pleas. In the Southern District he pleaded to a 1972 bank robbery to cover it and three other bank robberies, including the Oak Point bank robbery during which he beat the elderly manager over the head. In the Supreme Court of the State of New York, Bronx County, he pleaded to attempted murder of a police officer on a Class B felony to avoid the mandatory minimum. Even though he was innocent of this attempted murder, a police witness would testify to seeing him shoot at policemen, and the plea would cover a second attempted murder of a police officer, which he did commit. The State and Federal prosecutors promised him that in return for his cooperation, he would be permitted to take the above guilty pleas; his cooperation would be made known to the sentencing judges, and the sentences would be concurrent and served in federal institutions (201-204, 210, 255-256, 261-265). He knew the prosecutors would be more helpful to him if he named Hilton than if he didn't name Hilton (345). White was not sure whether he faced a 25 year maximum or a 15 year

to life sentence on the attempted murder plea (203, 329), and he thought the federal bank robbery plea subjected him to a 20 year maximum (207). However, the federal judge told him that he might be eligible for YCA treatment which carried a 6 year maximum (331), and, in any case, he expected his total sentence to be at least 10 years (335-338).

The Court precluded defense counsel from asking White if he knew that Johnny Rivers, a participant in the Oak Point robbery and a cooperating witness, had received a sentence of 3 years from the same federal judge (335-338).

Pending against White at the time of trial were attempted murders and robberies in Queens and an armed robbery in Brooklyn. No deals had been made on those charges (329-330). At a prior trial in which White testified, he said that he had no choice but to plead guilty to the Brooklyn robbery because he could not find a lawyer of his own choice to represent him. The Court precluded defense counsel at the instant trial from examining in this area to elicit the fact that William Kunstler, whose help White had solicited, was willing to represent him on the Brooklyn robbery charge (265-269).

On the day of his arrest for the instant bank robbery, White lied to the F.B.I. that a woman named Margaret was a participant in the hold-up (363). He also lied to the

doctors and to the judge during his YO commitment in order to effect a transfer into Matteawan State Hospital for the mentally ill (206, 313); or he actually believed at that time (his testimony is conflicting) that he was God, that he wanted to kill fellow prison inmates, and that since the doctors at the prison didn't do their jobs and since he was smarter than they were, he would have to kill the doctors, too (270-275, 277-278, 284). He also told the doctors, and believed it, that he was both the spouse and the child of Allah (308-309). After a hearing before a judge, he was sent to Matteawan. White testified he was sent to Matteawan for a term of one year to life, even though the only mention in the commitment papers is the length of his YO term (284).

Introduced as defense exhibits were the four 1968 memoranda of the psychiatrists finding White mentally ill and recommending White's commitment to Mattawan, and the Judge's certificate of commitment (301-304). While precluding the defense from introducing the staff diagnostic report of "psychoses with psychopathic personality paranoid and reactive features" (because there was no accompanying expert opinion on what effect this would have on White's truth-telling ability) (299), the Court permitted the prosecution to introduce the certificate of recovery and discharge from Mattawan, dated March 20, 1969 (383, 387).

White testified that he still believed at the time of trial that he was the giver and taker of life (277). He was getting Valium three times a day from the nurse at Sing Sing (241).

The prosecutor led White through his direct testimony on the specific events of the indictment (see, supra) and in the recitation of his criminal record (201-209), over defense objection. Specifically with respect to the criminal record, defense counsel objected that in prior trials, White often omitted facts about crimes and incarcerations when he wasn't led by the prosecutor. These objections were nonetheless overruled (207, 209).

Philip Weber lives across the street from the Jackson Heights bank. On the morning of April 10, he saw three negroes walking down the block toward the bank. A few minutes later, he saw three negroes hurry into a car and drive away fast, even though one tire on the car was low. He noted the license plate of the car and gave it to the police. The driver's side of the car passed within twenty-five feet of him, but when he was shown 50 to 75 pictures in the bank after the robbery, and another 50 pictures two weeks after the robbery, Mr. Weber could not make an indentification. By stipulation, the prosecutor conceded that appellant's photograph was included in both spreads (449-469).

The street in front of the bank was always clear; there was no garbage truck (458).

Objection on several grounds was taken to the testimony of Detective Otis Thompson. The only fact he had in his testimonial possession was that he had arrested appellant two months after the robbery and had seized from appellant's hand a .9 millimeter automatic gun, serial number erased (the same gun shown to White who said it was similar to the one carried by appellant the day before the robbery) (393-395). Counsel objected to this testimony and to the gun as being irrelevant and prejudicial. Appellant's possession of the gun two months after the robbery did not permit any reasonable inferences that it was the same gun used in the car theft or robbery, or that appellant possessed it two months earlier, or that appellant participated in the robbery, and there was no evidence that appellant used or displayed a gun during the robbery (172-173). This objection was overruled (173, 395). However, when the prosecutor sought to introduce the firing clips from the gun, the Court sustained objection on the very grounds he had overruled with respect to the gun itself (396, 408). Counsel then moved for a mistrial, because the following colloquy had revealed the clips to the jury.

Q: What else is in that envelope? Can you see, sir?

A: Yes. It's two clips.

Q: Do you know what they are?

A: Yes. The clips that go inside the gun.

MR. BLOOM: I object to this...
(395-396)

The mistrial was denied (410). Later, in his summation to the jury, the prosecutor showed the gun to the jury and stated, "you are entitled to conclude and consider what type of person carries around a thing like this." (625). Pursuant to counsel's objection, these remarks were ordered stricken (626).

The Court having ruled relevant the possession of the gun on the day of appellant's arrest two months after the robbery, counsel sought permission to prove that appellant was carrying the gun in self-defense.

> I have to give a reason. I have to - and I believe genuinely, the reason the F.B.I. - that indeed the F.B.I. was very much concerned with Fred Hilton was because of his political beliefs and what they perceived as a membership in the Black Liberation Army.... in view of your immediate ruling now, with regard to Mr. Hilton carrying the gun, that he was by what he was able to read in the newspapers, early 1973, that he was a member of the Black Liberation Army, dangerous. He had every reason to believe that law enforcement people were going to shoot him on sight and it was for that reason that he was carrying any gun. I again urge your Honor to permit me to elicit testimony from Mr. White and others as to Mr. Hilton's point of view about treatment of black people in this country and his own actions and thought in that regard.
>
> (174)

The Court denied the motion and offer of proof, replying, "I am now more convinced than ever that it's nothing but an attempt to turn a charge of bank robbery into a political discussion" (174).

The prosecutor offered to prove that after his arrest, appellant told Detective Thompson that he would have shot the Detective had he known he was a cop. The Court precluded this testimony as irrelevant and prejudicial (404), but the Detective said it anyway.

> Q: (MR. BLOOM): Did you shoot at him?
>
> A: I could have shot him, sir, but I didn't.
>
> Q: Because he wasn't facing your way; right?
>
> A: He had a gun, counsellor. He told me he would have shot me ——
>
> THE COURT: No. Just answer the questions. (428)

Further objection was taken, and sustained, but only after the Detective had already testified to the irrelevant circumstances of the arrest, which was for another crime, that the arrest was a combined effort of the F.B.I. and NYCPD, that it began with a combined briefing at 6:30 A.M. in the 75th Precinct, and that two radio cars pulled up to the stoop at 440 New Lots Avenue (391-395). Counsel moved for a mistrial or, in the alternative, for permission to show the reason for this large scale effort against appellant, or for a corrective charge

on the reasons for that effort.

> MR. BLOOM: ...what is the reality here. The reality here is Fred Hilton was thought to be a member of the Black Liberation Army.
>
> THE COURT: Don't repeat the argument.
>
> MR. BLOOM: I must make a record.
>
> THE COURT: Just say ditto if you want to add anything. Please don't repeat the argument. It is a vain attempt to turn this into a trial that it isn't and I won't stand for it. This is a charge of bank robbery.
>
> MR. BLOOM: I think your Honor will agree the reason the major effort was made is the reason was the law enforcement authorities thought Fred Hilton ——
>
> THE COURT: I can't agree with that. I can't agree. I think it is exaggerated in your mind and in the mind of many others.
>
> MR. BLOOM: Well, some of the others are involved... are sitting there (indicating) the gentlemen sitting I know is a member of the major case unit ——
>
> (411-412)

The Court called on Mr. Bloom to submit a corrective charge, but denied the one offered in this colloquy (391-395,410-411).

Robert W. Edgar, a professor of education at Queens College, would testify that it was his car that was stolen on April 9, and that appellant was one of the two men who took the car. Because he would make an in-court identification, the trial was interrupted for a hearing. The Professor testified on the hearing that he and his car were accosted at 1:45 P.M. in the Queens College parking lot.

Two men forced him into his car; appellant was the one who took the wheel. The other man with a gun sat in the back seat. Appellant had no gun (521-524). The Professor was in the car for the ten to fifteen minute ride on and off the L.I.E. to 169th Street where he was let out unharmed. He was told to leave his money, wallet, and watch on the front seat (525-526).

Over objection to the conclusory form of the question, the prosecutor asked, "based on your recollection of the day in question, April 9th, can you make an identification." The Court interrupted the examination and asked, over objection, "on what do you base your identification in Court today"; "Can you tell us whether the identification you made was based on the impression made during the ride that you described"; "Of course, the date was bright? The natural light was good? Is that correct?" The witness returned affirmative answers (529-530).

The Professor was engaged in three subsequent out-of-court identification sessions. The first was on April 10, the day after the theft. According to a report by F.B.I. agent William Baker, the Professor was shown "photographs of known bank robbers in the New York area, and photographs of known militants with the Black Liberation Army (BLA)." (540-541). He could not make an identification.

The second session was on July 6, 1973, when the F.B.I. showed him a series of 6 or 7 photos, including

photographs of Myers and Kearney. The Professor contradicted himself and testified first that he picked appellant's photograph and no others, and then he admitted that he had in fact picked a second photograph out of the same series which he said at the time, "strongly resembled" the second man in the car (530-533, 547).

The third session was a formal line-up conducted in the Eastern District Courthouse on January 17, 1974. The Professor was "told that a person who had been apprehended would be in the line." (535). He "immediately recognized" the man who had driven his car (534).

Although the government preserved the July 6 photo spread and the photographs and transcript of the line-up on January 17, 1974, from which, in both cases, the Professor had made identifications, the Government did not preserve the photo spread of April 10, from which the Professor failed to make an identification. It was probable that appellant's photograph was included in the July 10 spread, because "known BLA militants" photographs were shown, according to the F.B.I. agent's report. The government confessed its inability to produce Agent Baker or the spread. Counsel objected that this photo spread, and the fact that appellant's photograph was included, were necessary to his ability to meaningfully cross-examine the credibility of the Professor's imminent in-court identification, and that, without it, Professor

Edgar's identification should be precluded (541-552). At the close of the hearing, the Court ruled that the Professor's identification had an independent justification, that the subsequent identification procedures were not suggestive and that even if they were, the Professor's identification was independently based, (545-546), and that appellant's motion to preclude the Professor's in-court identification would be denied (although the Court asked the government to try and find Agent Baker and the photo spread) (551-552).

The Professor then took the stand in open court and testified substantially as he had at the preceding hearing (552-568). He again testified that he saw no gun in appellant's possession (568). He was asked, again over objection, if he could give a description "based on your recollection of April 9, 1973." (559). He identified appellant as the driver of his car on April 9 (559). During the prosecutor's direct examination about the July 6 photo and January 17 line-up identifications* (he did not ask about the failed identification of April 10), the Court interrupted and asked defense counsel in open court, "I assume defendant has no objection to this line of testimony?" Counsel replied, "No, your Honor" (565).

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* The photographs shown to the Professor on July 6, and the photographs of the line-up conducted on January 17 were introduced into evidence (561-62, 566-67).

At the conclusion of Professor Edgar's testimony, the government rested (568), and counsel requested a side-bar and explained for the record:

> Your Honor asked a little while ago if I had any objection to the line of questioning and as I did not want to say in front of the jury in view of your Honor's ruling with regard to the photos shown to Mr. Edgar on April 10, 1973, I felt that the wisest strategy was not to contest the identification by Mr. Edgar as to the April 9 incident in view of any inability to prove he, Mr. Edgar, observed a photograph of Mr. Hilton on April 10.
>
> (568-569)

The Court then inquired of the prosecutor, "Have you made any inquiry whether any record was kept because in my humble opinion ... it has something to do with defense's right to cross-examination" (569). When the prosecutor replied, "As far as the spread shown by Agent Baker, there is no way, whether Agent Baker was there or not ----" (572), there was some suggestion by both Court and prosecutor that the Professor be recalled and a stipulation be entered into (570, 571). Counsel replied, "It is too late now. If it had been done before, my view as to certain questions would have been different" (570a)..., ""What happened damaged me then." (572). Finally, the Court ruled,

> Nothing can be produced. You can argue that that does not help you... Because you still cannot cross-examine. I say the prejudice is minimal. (573)... I do not agree with you but I can see where you

> can make a valid argument... He says you have no right to use procedures that limits the right of cross-examination and violates his right of process. I find there is no violation but I should hope the F.B.I. would do things entirely differently in many respects, but I cannot set out the procedures for them.
>
> (573-574)

The prosecutor replied, "We are not in a position to change procedures" (574).

The only other government evidence was Twyman Myer's fingerprints taken from the inside of the right front window of the Professor's car (472-482), and two photographs of Phyllis Pollard (506). Appellant's motion for judgment of acquittal at the close of the government case was denied, and the defense rested (574).

During his summation to the jury, the prosecutor argued,

> You may also consider that not seven weeks subsequent to the bank robbery Freddie Hilton was arrested with this gun (indicating) in his possession, and I don't care whether the gun was in a briefcase or hidden under a jacket, there is no question but that it was in his possession, and you are entitled to conclude and consider what type of person carries around a thing like this (indicating).
>
> (625)

When counsel objected, the Court ordered the statement read back, and the reporter repeated it. Then the Court ordered it struck and charged,

> You know, Mr. Clarey -- disregard it, I think the statement is inappropriate, that is not in issue, the type of person before you. The only question before you is whether the Government has proved beyond a reasonable doubt that this defendant committed the bank robbery or aided and abetted in the bank robbery, and the only reason that evidence was permitted before was to corroborate, if you believe, the testimony of Avon White.
> (626)

The prosecutor replied, "I'm sorry, your Honor, I misunderstood earlier ruling" (626) [sic].

The prosecutor also argued to the jury that the government can only make deals for the truth.

> the deal as he stated it is not that you have to get your man, but you get on that stand and you tell the truth, that is your deal. It is the only possible deal we could ever get into ---
> (636)

Again, the Court asked the prosecutor to repeat the objectionable statement, and he did, and then the Court admonished the jury, "You just strike that, there is no testimony in the record on that. That is just Mr. Clarey's personal opinion and has no place in this record. He can only comment on the testimony which you have heard" (636).

After the prosecutor concluded his summation, counsel moved for a mistrial because of the above statement (642), and because once again charges were made by the prosecutor which the Court permitted to go unchallenged by its preclusion of defense evidence that appellant was

a special target of government overreaction, "Not because of a bank robbery, but because they believe him to be an active member of the Black Liberation Army" (646). The prosecutor had argued to the jury, "Now, ask yourselves, what has Mr. White got to gain... by lying and... implicating Mr. Hilton, either in that statement or in this testimony" (636-37). Counsel explained,

> Well, your Honor, indeed prohibited me from showing what Avon White has to gain. Avon White does not just have to gain by naming some 152 pound friend of his. This is a man who is hot, according to every item I read in the Daily News back in early 1973. Fred Hilton is somebody they wanted... (645) it was not my effort to put in what indeed Mr. Hilton's political philosophy is, or is not. I am talking about what indeed was Mr. White's perception of how much the authorities wanted Mr. Hilton and for that reason, for whatever their perceptions were ... it is beyond what Mr. White will say. It includes all the publicity that Mr. White would have been aware of...
>
> (647-48)

The Court, finally by the close of the trial, "not entirely free from doubts" (647), nonetheless, denied the motions (649).

The Court charged the jury with respect to the substantive counts,

> the Government does not claim that this defendant entered the Jackson Heights Federal Savings and Loan Association on April 10, 1973. The Government's claim is that the defendant aided and abetted the armed robbery of that bank on that day:

> (1) by stealing a 1967 Chevrolet owned by Professor Edgar at the Queens College Campus; and (2) by assuming the role of the driver of the getaway car ...
> (686)
>
> The Government must prove beyond a reasonable doubt that he stole this car with the intent and knowing that it was to be used the next day in the bank robbery... he must have known he was driving them there to rob the bank.
> (687-88)

With respect to the conspiracy count, he charged that the government must prove beyond a reasonable doubt that at least one of the overt acts in the indictment was committed, those acts being, as charged,

> 1. On April 9, 1973 at Queens, New York, the defendant Freddie Hilton and co-conspirator Avon White, at gun point, stole a 1967 Chevrolet, New York license plate 998-QDA from Robert Edgar.
>
> 2. On April 10, 1973, the defendant Freddie Hilton drove the above-described 1967 Chevrolet. . . from a location in the Bronx, New York to the vicinity of the Jackson Heights Savings and Loan Association....
> (694)

Pursuant to a note from the jury during their deliberations (731), the Court charged,

> The government must prove beyond a reasonable doubt that [overt act 1 took place.] Now, it also says he did it with a co-conspirator. I say that is surplusage. I think it is vital to the Government's case that they prove that either Freddie Hilton stole it with Avon White, or that he stole it with anyone else, but the Government must show that

> Freddie Hilton participated in that, in order to sustain that allegation. But you don't have to prove both. Now, two [overt act 2]. The Government must prove either one of those two overt acts and prove that they were committed beyond a reasonable doubt, by proof beyond a reasonable doubt, and that they were knowingly done, they were aware of what they were doing, and the purpose they were doing it, and it was done for the purpose of and in furtherance of the plans to rob the bank... evidence of other overt acts were also offered at the trial... but that does not mean that the Government is relieved of any responsibility of proving one of the two allegations in this count (743-44).

The Court failed to charge that an element to be proved on the conspiracy count was the federally insured character of the bank that was the object of the robbery conspiracy, although the Court did charge this element with respect to the substantive offenses.

The Jury Deliberations

At 10:45 A.M. on the second day of deliberations, (the jury had begun deliberations at 10:55 A.M. the preceding day), the jury sent the Judge "a very disturbing note":

> We have a very emotionally disturbed male juror who has reached a point of physical distress which in my opinion would require medical attention. This condition is almost making it impossible to continue with our deliberations. It is also my opinion that if you were to speak to the Jurors as to the clarification and definitions of the charges, it may help clear up negative views and refusal to deliberate. This may also help the emotional Juror. (716-717)

Counsel moved for a mistrial, and the Court summoned the jury into the courtroom. The foreman described the problem further:

> The problem here is one of which I am not able to say whether it is really a medical or requires a physician, there is a little tension and vice versa, I guess... (719) This is not an opinion, this is physically shown to the extent that the members of the Jury would feel concerned. In a sense it is just beyond a momentary disturbance of emotions (720).

The Court sent the jury back to deliberate and requested a note from the disturbed juror. The Court confided to counsel after the jury's departure, "I don't know whether I have got a fit juror there." (721). The court clerk suggested that "the oppressiveness of the room" might be causing the problem, and the Court adopted this suggestion and ordered the jury to continue their deliberations in an available empty courtroom. At 11:20 A.M. they retired to that courtroom after a re-reading of the charges (722, 729).

At 11:45 A.M. the jury requested further instructions on the overt acts (see supra) and asked if appellant had to have been in the car on the 10th to be guilty of the substantive offenses. They also said their new surroundings "helped... a gread deal" (731). The Court instructed them that appellant did not have to be in the car on the 10th as long as he stole the car on the 9th with the knowledge

and intent to use it for the bank robbery. He gave them the overt acts instruction and they returned to deliberate.

At 2:20 P.M., they returned to the courtroom with a verdict of guilty on the conspiracy (753). Counsel moved to set aside this verdict due to the circumstances described by the foreman and in the jury's note (758). The Court ordered the jury to continue deliberating on the substantive counts, and at 5:40 P.M. the jury returned verdicts of not guilty on the substantive counts (766-767).

Following the verdict the Court conducted a voir dire on the problems of the sick juror. The foreman confirmed that the decision to send the note was that of the whole jury and that,

> we thought he was just an emotional person who was upset for a moment because of the strain and the duress, and we thought it would be advisable, because of the medical background to seek medical assistance" (769)... changing the environment... really changed the whole, the whole, not alone for the distress of the one individual but it was of great assistance in helping each member of the jury" (770).

The note which the sick juror (#4) had prepared for the Court stated,

> I feel in reference to my problem which to me is both physical and mental, I am a nervous individual and I cannot endure long periods of stress and strain, which happened in this case. I at this point feel permanent damage could be done.

> This is my honest opinion and long periods of strain which at this point could aggravate the situation. (771-772)

The Court noticed that the juror, "does look like a very nervous individual" (733)... "a little more nervous than most people" (776). The Court then examined juror #4 in the cleared courtroom; and the juror concurred in the Court's assessment of his nervousness.

> it was really when I went into the other courtroom, I was more relaxed, and being maybe in that one room night have brought out the nervousness in me, and the tension, the feeling of sickness in the stomach... I was stuck there, to stay there, and to stay there, I feel if I stayed in that room any longer I actually thought my health and --- I would just go, I would just go out of my mind. (776-77)
> ... and just the fact that I got up this morning, I was -- I was still under stress even sleeping during the night... my conscious inside was debating the facts of the case, and what was going to happen eventually... I felt my health was in danger... In other words, you have to find an individual--- ...the verdict had nothing to do with it, the verdict was done honestly (776-779).

On the day of sentence, December 23, 1974, counsel moved to set aside the verdict as contrary to the weight of the evidence and internally inconsistent. This motion was denied, and the Court, having "considered and rejected" YCA treatment, sentenced appellant to 5 years imprisonment.

ARGUMENT

POINT I

THE GOVERNMENT'S MISUSE OF EVIDENCE AND ARGUMENT TO THE JURY TO PROVE APPELLANT'S CRIMINAL CHARACTER, WHILE VOUCHING FOR THE INTEGRITY OF ITS CONFESSED ATTEMPTED MURDERER CHIEF WITNESS, AND THE PREJUDICIAL REFERENCES BY ITS WITNESSES TO OTHER CRIMES AND APPELLANT'S DANGEROUS CHARACTER, DEPRIVED APPELLANT OF A FAIR TRIAL.

Appellant did not receive a fair trial confined to the evidence of the crimes charged, because the jury was told by the prosecutor and his witnesses, despite the elemental principles of constitutional criminal law forbidding it and the instructions from the judge precluding it,(1) that appellant's possession of a loaded gun two months after the bank robbery showed his dangerous criminal character (395-396, 625), (2) that, by his own admission after his arrest, he wanted to kill policemen (428), (3) that a combined FBI-NYCPD arrest effort involving patrol cars and early morning briefings was necessary to capture this highly dangerous individual against whom they must have had a lot of evidence and who must have been wanted for more than one simple bank robbery (391-395), (4) that the proceeds from the bank robbery were to be used to buy more guns for more crimes (386), and (5) that the government's case against appellant, through its chief accomplice witness, ought to be believed because the government can only make deals for the truth (636).

Of course, none of these statements had any arguable relevance to the issues on trial. In the case of the gun, although the prosecutor was arguing to the Judge the gun's relevance according to this Court's decision in United States v. Ravitch, 421 F. 2d 1196 (2d Cir., 1970) cert. den. 400 U.S. 834, he was arguing to the jury its forbidden prejudicial effect: "You may also consider.... and you are entitled to conclude and consider what type of person carries around a thing like this (indicating)." So, his actual purpose in getting the gun before the jury is stated for the record, ie. to abuse the Ravitch holding, which was certainly aware of, and warned against, the kind of prosecutorial misuse of the evidence that occurred in this case.

> to prove that defendants were the sort of persons who carried guns, and therefore were more likely than most to have committed an armed robbery, it might run afoul of the familiar rules that the prosecution may not introduce evidence of criminal character or generally of the commission of a crime on one occasion to prove the commission of a crime on another
>
> 421 F. 2d at 1204.

Besides his reference in the summation, where according to the record he pointed to or otherwise drew the jury's attention to the damning physical presence of the gun, the prosecutor wrung more prejudicial juice out of the gun when he elicited separate testimony and identification of the firing clips and when he literally

"aimed" it at Avon White (219-220). Thus, the record before this Court presents a clear example in the prosecutor's own words in summation, supplemented by his tactics on using the gun, of the exploitation of the prejudicial nature of irrelevant, or barely relevant, gun evidence, the "undoubted effect on the jury of seeing all this hardware on the table." United States v. Ravitch at 421 F. 2d at 1204-1205; cf. United States v. Falley, 489 F. 2d 33 (2d Cir., 1973); United States v. Bamberger, 456 F. 2d 1119 (3rd Cir., 1972); United States v. Lewis, 435 F. 2d 417 (D.C. Cir., 1970).

And, the gun in this case had little, if any, probative value to the charges on trial. The gun was seized from appellant two months after the robbery, and White could only testify that it was similar to the gun he saw in appellant's possession, but that it was also similar to his own gun that he (White) carried during the robbery (259). And, furthermore, the testimony that the serial number was erased and that the brand name of the guns carried by White and appellant was "Browning," did not actually come from White at all --- the prosecutor suggested both these facts to White in his questioning (219), and when he physically showed White the brand name on the gun offered for identification (220). Objections to these leading tactics were overruled. The prejudice is apparent. Thus, since there was no evidence

that this was the same gun carried by appellant during the robbery, since any similarities were suggested to the witness by the prosecutor, since the equally possible inference from White's testimony was that he was identifying his own gun, and since proof of possession of a gun months after the crime is tenuous proof at best of the commission of the crime, the admission of this gun in evidence provided mostly prejudicial evidence of another crime and criminal character, relative to its minimal materiality to the proof of the bank robbery; its admission in evidence was an abuse of discretion. United States v. Guglielmini, 384 F. 2d 602 (2d Cir., 1967) cert. den. 400 U.S. 820; United States v. Tramaglino, 197 F. 2d 928 (2d Cir., 1952) cert. den. 344 U.S. 864; United States v. Panczko, 353 F. 2d 676 (7th Cir., 1965) cert. den. 383 U.S. 935.

If there was no abuse of discretion in the plain admission of the gun in evidence (and even in Ravitch this Court suggested that the better practice was to exclude it. 421 F. 2d, 1204-1205), the prosecutor's statement in summation and his handling of the gun on its identification, and all the arrest circumstances which came in along with it, turned its admission into the abuse of discretion envisioned in Ravitch, where this kind of misuse of the evidence was not present.

If misuse of the gun, and the prosecutor's bad

character argument, was not sufficient to deprive appellant of a fair trial, the criminal propensity issue was injected again and again throughout the trial. Although specifically ordered by the trial judge not to testify to appellant's post-arrest statement that he would have shot the arresting officer had he known he was a cop, the arresting officer testified to it in a non-responsive, gratuitous answer to a question posed by defense counsel,

> Q: Did you shoot at him?
>
> A: I could have shot him, sir, but I didn't
>
> Q: Because he wasn't facing your way; right?
>
> A: He had a gun counselor. He told me he would have shot me----
>
> THE COURT: No. Just answer the questions.
>
> (428)

Although specifically ordered by the trial judge not to offer any testimony about other crimes allegedly committed by appellant, and presumably so instructed by the prosecutor, Avon White testified in response to a question by the prosecutor about what was done with the bank robbery proceeds, "It was put into a kitty... for food and rent and guns and stuff" (386). In both these instances, although the prosecutor might argue he was not at fault, he was specifically held responsible by the judge for clearly instructing his witnesses against their

prejudicial testimonies, gratuitous or otherwise. United States v. Alston, 483 F. 2d 1264 (D.C. Cir., 1973). In any case, the jury heard these remarks, including testimony of appellant's admission of intention to murder a policeman; prosecutorial bad faith or not, appellant's right to a fair trial on the evidence was hopelessly prejudiced.

Also, the prosecutor elicited from the arresting officer, over objection, the circumstances of the combined FBI-NYCPD arrest effort against appellant, for a different crime, which testimony contributed to the picture being painted of appellant as a dangerous, most-wanted criminal of murderous character who was probably guilty of the crimes on trial and many more and serious criminal activities. In Point II, infra, it will be shown that while this picture was being painted for the jury in the prosecution's case, defense counsel was precluded from defending against it.

Finally, while appellant's general character was impugned by prosecutor comment and irrelevant evidence, the character of the prosecution and its own confessed attempted murderer witness was sought to be enhanced by the prosecutor's testimonial statement in final argument that, "the only possible deal we [the United States Government] could ever get into" with witnesses is for truthful testimony (636). Thus, the government put its

authority behind the witness in order to bolster his credibility and it did so through the unsworn testimony of the prosecutor to the effect that the government never lies and never encourages its witnesses to lie. This Court has roundly condemned this tactic and reversed convictions where it was employed. United States v. Drummond, 481 F. 2d 62 (2d Cir., 1973; United States v. Grunberger, 431 F. 2d 1065, 1068 (2d Cir., 1970).

No curative instructions were given to the jury with respect to White's testimony about "the kitty for food and rent and guns and stuff," and the jury was not instructed to disregard or strike out the arresting officer's testimony that appellant had threatened to shoot him (although the Detective was told by the Court, "No. Just answer the questions"). No curative instruction was given against the Detective's testimony about the combined arrest effort. The Court rejected counsel's proposed corrective charge (see Point II infra), and no other was submitted to it.* No instruction was given with respect to the testimony about the firing clips from the gun seized upon appellant's arrest, although

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* There was a disconnected instruction that came 24 pages after the first mention of the arrest circumstances and that was in response to the question when did the Detective first see the gun. He answered, "when he came off the stoop," and the Court, without striking this answer, simply said, "The only issue is whether this is the gun that the witness took from the defendant Freddie Hilton and that is all" (415).

objection to the clips was sustained. Instructions were given to the jury to disregard the prosecutor's two offensive arguments in summation, but prior thereto the Court ordered each of the offensive statements repeated and read back, and then he merely called the criminal propensity statement "inappropriate" and the vouching statement, "Mr. Clarey's personal opinion [that] has no place in the record."

We submit that these errors, individually and cumulatively, were such that, had curative instructions been given, they could not erase the prejudicial effect on the jury's determination, especially when the prejudicial references were to appellant's criminal character and other crimes. United States v. Rinaldi, 301 F. 2d 576, 578 (2d Cir., 1962); United States v. Dominicis, 332 F. 2d 207 (2d Cir., 1964); United States v. Sansone, 206 F. 2d 86 (2d Cir., 1953). Curative instructions in this case could not substitute for the right to be tried on the charges in the indictment, especially given the prosecutor's direct assault on that right in his summation coming on top of all the other extraneous defamatory evidence. Indeed, the instructions that were given only served to have the offensive statements repeated and underscored to the jury without any stern admonishment to the prosecutor or warning to the jury about his proper role in the case. Bruton v. United States, 391 U.S. 123 (1968); United States v. Bugros, 304 F. 2d 177

(2d Cir., 1962); United States v. Grunberger, supra.

Nor could the errors here be regarded as harmless; the jury verdict of acquittal on the two more serious substantive offenses shows they had substantial doubts about the government's case, especially the testimony of Avon White, which if disbelieved, left only evidence of the car theft without intention or knowledge related to the bank robbery. But, given all the above criminal propensity evidence, the jury probably believed it had to convict of something. (See Point IV, infra, for further discussion of the non-rational verdict that resulted).

POINT II

THE COURT'S PRECLUSION OF EVIDENCE OF APPELLANT'S SELF-DEFENSE JUSTIFICATION FOR POSSESSION OF THE GUN AND THE GOVERNMENT WITNESS' MOTIVE TO FABRICATE A CASE AGAINST APPELLANT, AND THE GOVERNMENT'S FAILURE TO PRESERVE EVIDENCE DAMAGING TO THE CREDIBILITY OF ITS WITNESS, DEPRIVED APPELLANT OF THE RIGHTS TO PRESENT A DEFENSE AND CROSS-EXAMINE WITNESSES.

A. The Preclusion of the Evidence of Self-Defense and of Witness Fabrication Motives

At the start of the trial defense counsel sought a ruling from the Court precluding introduction of the gun for the reasons discussed in Point I, supra. When the Court ruled the gun relevant, counsel advanced an offer of proof that appellant's possession of the gun on the day of his arrest was unconnected to the bank robbery or any "other crime," and was carried in self-defense against

the possibility of imminent attack-to-kill by law enforcement authorities, a belief he could reasonably hold in the face of media portrayal of law enforcement attitude toward those it considered members of the Black Liberation Army. The Court dismissed this offer of proof, ruling, "it's nothing but an attempt to turn a charge of bank robbery into a political discussion" (174).

This offer of proof was reiterated throughout the trial, upon the admission of the gun, and upon the gun's accompanying circumstances of arrest. In the latter instance, the Court agreed with counsel that the circumstances of the arrest were irrelevant and prejudicial to the charges on trial however, he never ordered the testimony stricken, and he rejected counsel's offer of a corrective charge that would enable the jury to consider the real reason for those arrest circumstances: "The reality here is Fred Hilton was thought to be a member of the Black Liberation Army" (411). Since the testimony about the arrest had already come in, over defense objection, and the Court had called for an instruction that would best cure the error, counsel correctly argued that the simple "forget it" instruction would be useless and only serve to underscore the prejudicial matter (see Point I, supra, and authorities cited). The really corrective "charge" would have been to permit

the self-defense and the un-justified police motive for massive arrest procedures which counsel once again offered to prove, and to which would these arrest circumstances would well have been relevant. Standing alone, of course, without the benefit of that other proof, the circumstances were purely prejudicial (Point I, supra). But, once again the Court denied the offer of proof: "It is vain attempt to turn this into a trial that it isn't and I won't stand for it. This is a charge of bank robbery" (411).

When the prosecutor attempted to salvage the severely damaged credibility of Avon White by arguing to the jury that White could have had no special reason for naming Hilton in the bank robbery (645), once again counsel objected that the prosecutor was able to make that argument free of contradiction because of the Court's preclusion of evidence that White was aware he had everything to gain by giving the government a man who was a most wanted, member of the government's most-wanted group (albeit for politically misperceived, paranoic and racial reasons), the Black Liberation Army. As counsel explained,

> Avon White does not just have to gain by naming some 152 pound friend of his. This is a man who is hot, according to every item I read in the Daily News back in early 1973 (645)... it was not my effort to put in what indeed Mr. Hilton's political philosophy is, or is not. I am talking about what indeed was Mr. White's perception of how much the authorities wanted Mr. Hilton and

> for that reason, for whatever their perceptions were... it is beyond what Mr. White will say. It includes all the publicity that Mr. White would have been aware of ... (647-648).

Although, after this argument and by the end of the trial, the Court was, "not entirely free from doubts," and offered to hold some kind of post-verdict testimony just to see what White would say, the result was that appellant was denied a full and fair opportunity to cross-examine and present extrinsic evidence on White's motive to falsely implicate appellant. And this error was compounded by the prosecutor's remarks in summation capitalizing on the cross-examination deprivation by suggesting there was no such motive. Davis v. Alaska, 94 S. Ct. 1105, 1111 (1974); United States v. Haggett, 438 F. 2d 396 (2d Cir., 1971) cert. den. 402 U.S. 946; United States v. Kartman, 417 F. 2d 893 (9th Cir., 1969) (reversible error to preclude cross-examination of U.S. Marshall on his bias against anti-war demonstrators); United States v. Lester, 248 F. 2d 329, 334 (2d Cir., 1957).*

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* The cross-examination of White was unfairly limited in several other respects. Appellant was not permitted to examine him on his awareness that Johnny Rivers, another bank robbery cooperating witness, received only a 3 year sentence from the same judge who would sentence White (335-338); that he had lied on the witness stand at a prior trial about his inability to find a lawyer of his choice to represent him (265-269); that he had been the subject of a Mattawan Staff diagnosis of "psychosis with psychopathic personality paranoid and reactive features" (299), (but the prosecutor was permitted to show he had recovered from any mental malady (383)). Cross-examination was further nullified by the prosecutor's leading White, over defense objection, on the details of his prior criminal record, especially when, in other trials, White had omitted several of those details (208).

Thus, it is clear that counsel's offer of proof on the cross-examination of White and in defense of the charges, both indicted and uncharged, that came into this trial, the gun, the arrest circumstances, the admission, the entire testimony of Avon White, was relevant and material, and the Court had no real basis for precluding it. The Court's simple dismissal of this right to a defense on the stated grounds, "it's nothing but an attempt to turn a charge of bank robbery into a political discussion (174)... a vain attempt to turn this into a trial that it isn't" (411), had no basis in any fact in the record and totally disregarded counsel's disclaimers of any such intentions and his clear showing of the logical and legal relevance of the offer. Recently, in reversing a summary judgment for criminal contempt, this Court rejected a similar unfounded ruling on the part of a trial judge. In a civil case the plaintiff had offered to prove that F.B.I. accusations against him were false and racially motivated and that his actions were taken in self-defense against, "'threats and attempts that had consequently been made against his life; that for that reason he had frequently carried weapons with him for self-defense...'" In the Matter of Contempt Proceedings against Robert F. Williams, 2d Cir., decided January 10, 1975 (Docket No. 73-2697, slip. op. pp. 1277-1299 at 1281). This Court said,

> the circumstances which generated the subject matter of the contempt were brought about by two fatal misconceptions. The first, on the part of the trial judge, was the assumed liklihood that the plaintiff would attempt to disrupt the orderly processes of the trial and use the proceedings as a sounding-board for racial protest and the enunciation of his socio-political views (Id at 2183-2187)... it is reasonably clear from the record before us that Williams, when he took the witness stand, had no intention or purpose to disrupt or delay the proceedings. (Id at 1291-1292). (emphasis supplied)

So, the Court in this case had no reason to "assume," without some factual basis, that an otherwise relevant defense would disrupt the proceedings. And, certainly, if such a defense was "just generally" relevant in a case for civil damages against an airline who was asserting it had the right to deprive the plaintiff of air transport because of possible skyjacking, it was relevant against criminal charges by the government who was asserting the right to deprive appellant of his liberty.

> Prejudice toward a group of which defendant is a part may be a source of partiality against the defendant. He is therefore entitled to a reasonable opportunity to cross-examine witnesses as to the existence of any prejudice, and its possible effect upon their testimony.
>
> United States v. Kartman, supra, at 897.

In United States v. Dellinger, 472 F. 2d 340, 408-409 (7th Cir., 1972), the Circuit Court found error in the trial judge's preclusion of the defense offered

testimony of former Attorney General Ramsey Clark when, "an intention to engage in prejudicial conduct is not clearly shown," and when,

> In the context of the defense theory, it could have been significant that it may have required a telephone call from the Attorney General of the United States to move the mayor into negotiations with these groups. It would, at least, have added a dimension to the defense's version of the facts, and, therefore, it should not have been excluded.
> 472 F. 2d at 409 (emphasis supplied)

In this case, the trial court's personal estimation of the truth or possible probative value of the defense or his attribution to defendant and counsel of ulterior motives without foundation in the record, deprived appellant of the right to make that defense, and a new trial is necessary. "It is always hard to say what reasonable people may deem logically material, and all doubts should be resolved in favor of admission, unless some definite rules, like that against hearsay, makes that impossible." United States v. Matot, 146 F. 2d 197, 198-199 (2d Cir., 1944) (Hand, J.); Hughes v. United States, 427 F. 2d 66, 69 (9th Cir., 1970); United States v. Womack, 454 F. 2d 1337, 1346 (5th Cir., 1972).

B. The Government's Failure to Preserve Exculpatory Evidence Damaging to the Credibility of its Witness

Professor Edgar, the prosecution witness who testified that he and his car were abducted on the day

before the robbery, failed to make an identification of the thieves when he was shown photographs of "known" BLA members and bank robbers on the day after the theft of his car. The government could not produce the FBI agent who conducted and arranged the photo spread, nor could they produce the spread itself. The Court ordered the in-court identification testimony of Professor Edgar to proceed over defense objection that without that evidence and the fact that Fred Hilton's photograph had been shown to the Professor on the day after the robbery counsel was deprived of any meaningful ability to cross-examine the in-court identification. Relying on the Court's ruling, counsel made a strategic decision that affected the entire defense. He could not effectively impeach the witness' identification of appellant as one of the car thieves, because the government, while carefully recording the photographs and circumstances of two subsequent identifications conducted three months and nine months after the car theft, had conveniently lost all trace of the failed identification conducted almost immediately after the event. Counsel, therefore, decided to concede the identification and to argue to the jury that Avon White's testimony was incredible and that appellant's participation in the car theft was without the knowledge and intention that the car would later be used in the bank robbery. In so doing, of course, he in no way voluntarily waived his initial objection to the

deprivation of the exculpatory evidence and the right to cross-examination, and he preserved his motion for the exclusion of Professor Edgar's testimony. "In view of this advance ruling, [he] was entitled to attempt to offset the prejudicial effect of admission... by using it to support his defense." United States v. Puco, 453 F. 2d 539, 541 (2d Cir., 1971); United States v. Maynard, 476 F. 2d 1170, 1175 (D.C. Cir., 1973); United States v. Straughan, 453 F. 2d 422 (8th Cir., 1972); United States v. Heffner, 420 F. 2d 809, 813-814 (4th Cir., 1969).

Effective impeachment of the prosecutor's witness having thus been precluded and concession of the identification having been won from defense counsel, the prosecutor then went ahead and introduced, not only the Professor's in-court identification, but the testimony and photographs of the two latter out-of-court photo and line-up identifications. The Court rubber stamped the concession when he asked defense counsel in open court during the Professor's direct examination, "I assume defendant has no objection to this line of testimony?" to which counsel had to reply, "No, your Honor." (565).

There is no doubt of the relevant impeachment value of this evidence on cross-examination of a major government witness, and the trial judge was, therefore,

not empowered to rule that the prejudice was "minimal." Generally, it is impossible to know the effect of its deprivation on the outcome of the trial, and, generally, its negligent loss by the government requires a new trial. United States v. Consolidated Laundries, 291 F. 2d 562 (2d Cir., 1961); Brady v. Maryland, 373 U.S. 83 (1963).

> counsel should have been permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness. Petitioner was thus denied the right of effective cross-examination which ' "would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." Brookhart v. Janis, 384 U.S. 1, 3, 86 S. Ct. 1245, 1246, 16 L. Ed. 2d 314.' Smith v. Illinois, 390 U.S. 129, 131, 88 S. Ct. 748, 750, 19 L. Ed. 2d 956 (1968).
>
> Davis v. Alaska, 94 S. Ct. 1105, 1111 (1974).

The specific prejudice to appellant in this case, however, is manifest. During their deliberations, the jury asked specifically if they had to find that appellant had driven the getaway car on the day of the robbery in order to find him guilty of the robbery, or was his participation in the previous day's theft of the car itself enough to make that guilt. This question indicates that the jury was not convinced of Avon White's testimony that appellant had driven the getaway car on the day of the robbery; the Professor's testimony, however, not

having been in any way impeached as to the reliability of his identification of the car thief, could not be doubted. Had they heard evidence that the Professor failed to identify appellant the day after the theft; had they heard the argument that, "the very fact that the witnesses had once rejected [appellant's photograph] might have subconsciously enhanced their willingness to accept one on the second go-around" United States v. Fernandez, 456 F. 2d 638, 642 (2d Cir., 1972); had they heard the further fact that the Professor mistakenly testified he was certain he had chosen only appellant's photograph during the July 6 photo "second go-around," when, in fact, he had chosen a second photograph, then given their well-founded distrust of Avon White, they may have had a reasonable doubt as to the Professor's identification and acquitted appellant of the conspiracy as they acquitted him of the two substantive bank robbery charges. If a failed out-of-court identification doesn't require suppression of in-court testimony as long as all the facts are aired to the jury (United States v. O'Neal, 496 F. 2d 368 (6th Cir., 1974)), then when the facts of a failed identification are kept from the jury by government suppression, the in-court testimony must be suppressed.

This Court has in the past put the government "on the clearest possible notice of its obligation" to

preserve Jencks Act, exculpatory and scientific evidence for defense scrutiny and possible use in cross-examination of government witnesses who will be testifying to facts to which that evidence is material. United States v. Dioguardi, 428 F. 2d 1033, 1038 (2d Cir., 1970) cert. den. 400 U.S. 825; United States v. Kelly, 420 F. 2d 26 (2d Cir., 1969). Although bad faith is not a necessary ingredient to prejudicial Jencks Act deprivation (Lee v. United States, 368 F. 2d 834 (D.C. Cir., 1966)), the government's seeming unwillingness in this case and in others (See United States v. Movus Hall, Docket No. 74-1938, argued in this Court on January 10, 1975) to follow this Court's direction may indicate that bad faith, especially in situations where so much care is taken to preserve inculpatory identifications. Here the following colloquy between the Court and the prosecutor expresses the government's attitude.

> THE COURT: He says you have no right to use procedures that limits the right of cross-examination and violates his right of process. I find there is no violation but I should hope the FBI would do things entirely differently in many respects, but I cannot set out the procedures for them.
>
> THE PROSECUTOR: We are not in a position to change procedures.
>
> (573-574)

It should also be noted that the Supreme Court in United States v. Ash, 413 U.S. 300, 93 S. Ct. 2568,

2578-2579 (1973), held "equality of access" to photographic identifications necessary to Fifth and Sixth Amendment rights to due process and counsel and charged the government with the preservation of such access.

> Selection of the picture of a person other than the accused, or the inability of a witness to make any selection, will be useful to the defense in precisely the same manner that the selection of a picture of the defendant would be useful to the prosecution. In this very case, for example, the initial tender of the photographic display was by Bailey's counsel, who sought to demonstrate that the witness had failed to make a photographic identification. Although we do not suggest that equality of access to photographs removes all potential for abuse, it does remove any inequality in the adversary process itself and thereby fully satisfies the historical spirit of the Sixth Amendment's counsel guarantee.
>
> . . .
>
> Pretrial photographic identifications, however, are hardly unique in offering possibilities for the actions of the prosecutor unfairly to prejudice the accused. Evidence favorable to the accused may be withheld; testimony of witnesses may be manipulated; the results of laboratory tests may be contrived. In many ways the prosecutor, by accident or by design, may improperly subvert the trial. The primary safeguard against abuses of this kind is the ethical responsibility of the prosecutor, who, as so often has been said, may "strike hard blows" but not "foul ones." .... If that safeguard fails, review remains available under due process standards.

Finally, in anticipation of government argument that a stipulation was offered to establish the fact that Freddie Hilton's photograph had indeed been included in the batch shown to the Professor on April 10,* that offer came in the form of a vague suggestion in the middle of colloquy after the Professor had been examined on his various identifications and excused from the stand as the last witness in the trial, and it came after counsel had adopted a defense strategy conceding the identification and after the Court had elicited before the jury counsel's affirmance of the concession. Any recall for cross-examination at that point would have made the defense appear to be contradicting its own position, and could not replay the direct examination to give counsel an opportunity to properly object or erase the effect of the minimal cross-examination. And, the possibility of a cross with a stipulation would not cure the absence of the actual spread itself, especially when the prosecutor had already introduced into evidence the photographs of the two other out-of-court identifications.

POINT III

THE COURT ERRED IN FAILING TO CHARGE THE JURY THAT AN ELEMENT OF THE CHARGE OF BANK ROBBERY CONSPIRACY WAS THE FEDERALLY INSURED CHARACTER OF THE BANK THAT WAS THE OBJECT OF THE CONSPIRACY.

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* As was done with the witness Philip Weber who testified that he saw the getaway car pass within 25 feet of him, but he could not identify anyone from photographs shown to him on two occasions.

Although the Court charged the federal jurisdictional element on the two substantive bank robbery counts, he omitted to charge that element on the conspiracy count. The jury acquitted appellant of the former two counts, and convicted him of the latter count of conspiracy. The failure to charge an element of the crime of which the defendant was convicted is plain error and requires a new trial in this case on the conspiracy. United States v. Howard, 2d Cir., November 15, 1974, Docket No. 74-1282.

It should be noted that there was some issue as to the proof of federal insurance. The government's evidence, objected to as irrelevant, was a certificate from 1966, and a check for premiums dated in 1974, which the assistant manager testified covered the premiums for the year 1973. She said there had been no need to pay premiums in 1973, but this, of course, was a fact for the jury. cf. United States v. Hamilton, 452 F. 2d 472, 479 (8th Cir., 1972); Kane v. United States, 431 F. 2d 172, 175-176 (8th Cir., 1970). In any case, proof or no, the failure to apprise the jury of their obligation to consider and find the fact beyond a reasonable doubt, requires reversal and a new trial.

POINT IV

BECAUSE THE JURY DELIBERATIONS LEADING TO THE GUILTY VERDICT OF CONSPIRACY OCCURRED LARGELY WHILE ONE JUROR WAS "VERY EMOTIONALLY DISTURBED" TO THE "POINT OF PHYSICAL DISTRESS" AND

"PERMANENT DAMAGE" TO HIS HEALTH, AND AN ACQUITTAL OF THE ACTS NECESSARY TO THE PROOF OF THE CONSPIRACY CHARGE OCCURRED AFTER THE CONDITION WAS SUPPOSEDLY IN REMISSION, THE VERDICT ON THE CONSPIRACY CHARGE WAS NOT RATIONALLY ACHIEVED.

The jury acquitted appellant of the facts essential to proof of the conspiracy charge and found him guilty of conspiracy while, for two thirds of their fifteen hour deliberating period, one of the jurors was in various stages of mental and physical collapse. We submit that the conspiracy verdict was incompetent, and that this was demonstrated by the jury itself in their unsolicited confession during deliberations that one juror was "very emotionally disturbed... almost making it impossible to continue with our delberations," and infecting the proceedings with "negative views and refusal to deliberate" (716-717; in the confession of the sick juror himself that he felt "permanent damage could be done" to his health and he "would just go, just go out of my mind" (776-777), and that, "In other words, you have to find an individual---" (778); and in the demonstrated irrationality of the separate verdicts the jury rendered.

In this case, the judge charged the jury that in order to find guilt of the conspiracy they would have to find proved beyond a reasonable doubt one of the two overt acts in the indictment. In order to find guilt on the conspiracy the jury would have to find proved beyond a

reasonable doubt either (1) that appellant drove the getaway car on the day of the robbery, or (2) helped steal the car with intent and knowledge on the day before the bank robbery. The jury was also charged that one of these two overt acts was necessary to conviction on the substantive charge of aiding and abetting the bank robbery. Thus, when the jury acquitted appellant of the substantive offense, they found that neither of the overt acts had been proved beyond a reasonable doubt, that the proof was insufficient that appellant stole the car or drove it on the day of the robbery. Thus, the jury could not find guilt of the conspiracy, if they were acting rationally without the presence of the sick juror who was apparently insisting on some guilty verdict. This is exactly the situation envisioned in United States v. Zane, 495 F. 2d 683, 691 (2d Cir., 1974), where, "An acquittal on a conspiracy count would bar conviction on a substantive count [or vice versa] only if it constituted a 'determination favorable to the petitioner of the facts essential to conviction of the substantive offense...' Sealfon v. United States, 332 U.S. 575 (1948)." In Zane itself this Court neutralized the inconsistency by finding in the record some foundation in the evidence that would have enabled the jury to conclude guilt on the one charge and innocence on the other. No such foundation existed in this case where the government's indictment and

evidence actually precluded different verdicts on the charges, and the issues were sharply drawn by the Court.

There is no rational justification for this verdict, and there is "clear evidence" that it was the product of irrational processes, "a juror's incompetence... to deliberate at the time of his service." United States v. Dioguardi, 492 F. 2d 70, 78 (2d Cir., 1974); 28 U.S.C. §1865(b)(4). (See Point I, supra, for the other possible incompetent contributory factors). After 9 hours of the 15 hour deliberation period this juror finally broke down and admitted he was claustrophobic and had a long history of nervousness and inability to withstand extended periods of stress and strain. Had he admitted this during the jury selection voir dire, in response to questions about physical or mental impairment that were asked there, he certainly would have been excused from the jury (See Dioguardi, supra, dissenting opinion at 85), but he remained silent and his later breakdown in the jury room, according to the jurors' own statements, distorted the deliberative process. We do not know what actually went on in there, but whatever manifestation the juror's "very emotionally disturbed" behavior took, it was enough to frighten the other jurors into calling on the Court to provide medical assistance, which, of course, was not provided. It is also quite possible that this juror's behavior had a coercive effect on the rest of the jurors,

and that the guilty verdict on the conspiracy was as much a result of the wish to sedate this sick man's insistence on a guilty verdict as it was a result of changed rooms.

In this case, then, unlike Dioguardi, supra, there are objective facts of incompetence during the actual deliberations, (1) in the opinions of the 11 jurors who said they couldn't deliberate with this man, (2) in the Court's own observation of him, "a very nervous individual" (773), (3) in the juror's own admission that he was going out of his mind, and he had a history of anxiety in stressful situations, and (4) in the absolutely irrational verdict that resulted. The facts have already come to light in the expressed desperation of the jury itself, and in the subsequent inquiry conducted by the Court, so the policy against invasion of the jury processes is not breached here. The verdict should be overturned and a new trial ordered.

Appellant preserves his objection to the jury selection process in this case in which the prosecutor systematically challenged young people; the final 12 jurors were not appellant's peers by race or age, and the panel of 66 prospective jurors contained only 6 or 7 black jurors. Taylor v. Louisiana, decided in the Supreme Court January 21, 1975, Docket No. 73-5744, 16 Cr. L. 3033; Hamling v. United States, 94 S. Ct. 2887, 2917-2919 (1974); Hernandez v. Texas, 347 U.S.

475, 479-480 (1954).

POINT V

THE COURT ABUSED ITS DISCRETION IN DENYING APPELLANT YOUTH CORRECTIONS ACT TREATMENT WITHOUT A "NO BENEFIT" FINDING.

Appellant, having been acquitted of the substantive bank robbery offenses, convicted only of conspiracy, and having had only one prior misdemeanor conviction as a youth in North Carolina, should have been granted Youth Corrections Act treatment. United States v. Hopkins, 491 F. 2d 1127 (2d Cir., 1974); United States v. Coefield, 476 F. 2d 1152, 1155-56 (D.C. Cir., 1973); United States v. Toy, 482 F. 2d 741 (D.C. Cir., 1973); cf. United States v. Butler, 481 F. 2d 531 (D.C. Cir., 1973). We ask this Court upon its own review of the probation report to find a substantive absuse of discretion and remand for resentencing. In the alternative, there was a procedural abuse in the Court's failure to make the necessary and express finding of "no benefit" from treatment under the YCA. 18 U.S.C. 5010(d); Dorszynski v. United States, 94 S. Ct. 3042 (1974).*

CONCLUSION

FOR THE ABOVE STATED REASONS, THE JUDGMENT OF CONVICTION SHOULD BE REVERSED AND A NEW TRIAL ORDERED, OR, IN THE ALTERNATIVE THE CASE REMANDED FOR RESENTENCING.

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* "Consideration and rejection" is not the holding of Dorszynski (See sentence minutes at p. 8).

Respectfully submitted,

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